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Supreme Court of the United States.

OCTOBER TERM, 1947.

GAHAGAN CONSTRUCTION CORPORATION,
Petitioner,
v.
PHILIP ARMAO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Statement of the Matters Involved.

The petition of Gahagan Construction Corporation respectfully represents to this Honorable Court as follows:

Gahagan Construction Corporation, at the time of the events herein referred to and for some considerable time prior thereto, was engaged in conducting dredging operations for the Commonwealth of Massachusetts through its Department of Public Works under the terms of written contracts dated December 14, 1943, and October 2, 1944,

between the said petitioner (hereinafter called the defendant) and the said Commonwealth. The terms and provisions of the written contracts were introduced in evidence at the trial in the District Court (R. pp. 69, 70) and certified copies of both contracts were admitted in evidence and marked Exhibits 4 and 5, respectively. These original exhibits were made a part of the record on appeal to the Circuit Court of Appeals for the First Circuit and have been certified from the Circuit Court to this Court and may be referred to. Specifically the contracts required the placing of approximately 4,000,000 and 10,000,000 cubic yards, respectively, of hydraulic filling for embankments "A," "B," "C" and "D" at the General Edward Lawrence Logan Airport, East Boston. The defendant, Gahagan Construction Corporation, by virtue of these contracts, undertook to dredge material for the said embankment by the hydraulic method from the designated "borrow area" and to place this material as fill in the embankments to the lines and grades shown on certain plans. The dredging of the fill and depositing of the same at the Airport through pipelines connected to and running from the dredge to shore was all part of one operation.

One of the defendant's dredges, known as Dredge No. 5, was exclusively employed in the work described above from July 23, 1945, to November 11, 1945.

Dredge No. 5 had no motive power of its own and had to be towed by tugs or other vessels when coming from or going to the locus of operations (R. p. 160). The only machinery aboard was steam turbine engines which operated the mechanism for digging and hoisting and controlling the "spuds" which were used in holding the dredge in place during actual dredging operations in shallow water. The spuds were also used in conjunction with spring lines attached to anchors, the spuds acting as pivots so that the dredge could be moved forward short distances within the

confines of the "cut" (a more complete description of the operation of the spuds may be found in the record at pages 113, 114, 132, 133, 161, 170). There were no accommodations for sleeping aboard Dredge No. 5 except that there were two rooms with a cot in each reserved for government or state inspectors. Nobody lived or slept aboard during the operations in Boston Harbor (R. p. 173). All personnel of this dredge slept on shore and were not furnished food by the dredge (R. p. 148). None of the men aboard were licensed, including the so-called captain and mates. The only license aboard this dredge was a Massachusetts state boiler license (R. p. 171).

The respondent, Philip Armao (hereinafter called the plaintiff), was employed by the defendant, Gahagan Construction Corporation, on or about July 23, 1945, and was hired to do general laboring work aboard Dredge No. 5. Specifically his work consisted in working on the pipe, floating pipe behind the dredge, cleaning up around the dredge, taking stone out of the pump when it was sucked in through the pipe, working on the derrick when moving anchorage, checking "range lights," and serving coffee to the leverman or person in charge of operations aboard the dredge (R. pp. 118-120, incl.; also p. 160). Armao had no duties pertaining to navigation of the dredge except possibly the occasional and incidental task of making lines fast or unfast while the dredge was at the locus of dredging operations. He worked under a so-called "leverman," who had no articles and was not an officer, but who merely operated the machinery for digging, hoisting or moving the spuds. Armao had no "articles" and never signed "articles" with respect to any employment with the defendant corporation (R. p. 159). He was paid by members of the shore office personnel and not by anyone attached to the dredge (R. pp. 160, 171). He was hired to do general manual or laboring work; his contract was not with the

ones in charge of the dredge but with the corporation officials on shore; his time card was kept by a timekeeper on shore and he was required to have a social security card (R. p. 171). Prior to his employment with the defendant corporation, Armao worked in various capacities, none of which were even remotely connected with ships, boats, vessels, navigation or matters maritime in nature (R. p. 33).

During the entire time from July 23, 1945, the date of Armao's employment with the defendant corporation, to November 11, 1945, the date of his accident, he and all other personnel aboard Dredge No. 5 were engaged in conducting the dredging operations, which were exclusively for the purpose of filling in land. The District Court judge so ruled (R. p. 180).

At the time the plaintiff Armao sustained his injuries and for a considerable period prior thereto Dredge No. 5 was operating in Boston Harbor close up to the shores of East Boston, in shallow water, and was pumping silt and sand from the bottom through a pipeline extending from the pump on the dredge all the way to shore at the East Boston Airport (R. p. 161), for the sole purpose of supplying and actually depositing fill for the elevation and grading of the embankments already referred to. In most instances the dredge had to cut its own channel and was digging in through flats (R. pp. 165, 166) which were bare at low tide (R. p. 174). The waters immediately surrounding Dredge No. 5 during its operations in November, 1945, were so shallow that at low tide the entire area was above water (R. p. 95). Only four hours out of twelve would the flats be covered by water, and even then at flood tide the depth of water over the flats would not exceed 4 to 5 feet (R. p. 165). When Dredge No. 5 began excavating, the immediate area was all flats. As it excavated, the dredge could then move in further and could float in

the "cut" that had been excavated in the flats (R. p. 166). Dredge No. 5 was actually digging its way through mud flats and was completely landlocked except where it had already dredged (R. p. 95). During these dredging operations the dredge would move forward about 40 to 70 feet per day. When the end of one "cut" was reached the dredge would be towed back to the beginning of the next "cut" by attending tugs. (Certain charts and plans showing location of work soundings, etc., were admitted in evidence at the time in the District Court and marked Exhibits 6, 7 and 8, and subsequently were made parts of the record on appeal. The original exhibits have been certified from the Circuit Court of Appeals for the First Circuit to this Court and may be referred to in support of this statement of facts.)

On November 11, 1945, while engaged in the operations described above, the plaintiff Armao was injured when his hand became caught in a pulley block through which the cable attached to the "cutter" ran.

Subsequently to the receipt of his injuries the plaintiff Armao entered into a written agreement with the defendant's insurer with respect to payment of compensation under the Massachusetts Workmen's Compensation Act, and such agreement was filed with the Industrial Accident Board and approved by it (R. pp. 141, 142). Armao was represented by counsel in pursuing his remedies under the State Compensation Act (R. p. 143). All payments to the plaintiff by the defendant's insurer were made under its obligations to the defendant corporation by virtue of certain policies of insurance issued by the insurance company to the corporation (R. p. 188; see also Opinion, R. p. 208).

The plaintiff Armao accepted compensation from the defendant's insurer and otherwise actively pursued his remedies under the State Compensation Act for a sub-

stantial period of time with the advice of able and competent counsel and with the approval of the Massachusetts Industrial Accident Board, acting under the provisions of the Workmen's Compensation Act.

The defendant, in addition to accepting the provisions of the Massachusetts Workmen's Compensation Act, also secured to its employees the payment of compensation under the Longshoremen's & Harbor Workers' Compensation Act of the United States (33 U.S.C. §§ 901 *et seq.*) (Opinion, R. p. 200: "The defendant was insured under both of these acts").

Although still receiving compensation under the State Act and otherwise actively perfecting his claim before the Industrial Accident Board, the plaintiff brought this civil action at law under the Jones Act and the same was tried before a judge and jury in the District Court of the United States, District of Massachusetts. The entire record, proceedings and evidence, with certain omissions noted in the petitioner's "Designation of Contents of Record" (R. pp. 191-193, incl.), became a part of the record on appeal. That record and all subsequent proceedings in the Circuit Court of Appeals have been certified to this Court for the purpose of supporting this petition and may be referred to. The pleadings are completely set forth in the record, pp. 1 to 9, inclusive.

The jury returned a verdict for the plaintiff Armao in the sum of $19,255, which, on motion of the defendant, was reduced by the amount of $2032 (the amount received by Armao as compensation under the State Act) (R. p. 190).

The defendant corporation, claiming to be aggrieved by the District Court's denial of its motions for a directed verdict, motions to set aside the verdict, its requests for rulings and instructions to the jury, and by other errors of law more specifically set forth in its "Statement of Points" (R. pp. 195-197, incl.), appealed to the United

States Circuit Court of Appeals for the First Circuit. This cause was argued November 4, 1947, and on January 6, 1948, the said Circuit Court affirmed the judgment of the District Court. The memorandum of the District Court appears in the record at pages 18 to 23. The opinion of the Circuit Court of Appeals appears in the record at pages 199 to 208. Neither the memorandum nor the opinion has yet been printed in any official report.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by an Act of February 13, 1925, C. 229, 28 U.S.C. Sec. 347 (a).

Reasons Relied on for Allowance of Writ.

1. Conflict between Decisions of Circuit Courts of Appeals.

The decision of the Circuit Court of Appeals for the First Circuit in this case is directly opposed to and in conflict with decisions of this Court and of the Circuit Court of Appeals for the Fifth Circuit in that it concluded that "if the plaintiff [the present respondent, Philip Armao] was a seaman injured on navigable waters, there is no place for the application of the doctrine of local concern" (Opinion, R. p. 204) and in that it declined to follow the Fifth Circuit cases of *Fuentes* v. *Gulf Coast Dredging Co.*, 54 F. (2d) 69 (1931); *United Dredging Co.* v. *Lindberg*, 18 F. (2d) 453 (1927); cert. den. 274 U.S. 759 (1927), and *J. C. Penney-Gwinn Corp.* v. *McArdle*, 27 F. (2d) 324, which are supported by a dictum of Judge Healey in a case arising in the First Circuit—see *Melanson* v. *Bay State Dredging & Contracting Co.*, 62 F. Supp.

482, 485 (D. Mass. 1943), even though the said cases which were relied upon by the defendant (the present petitioner, Gahagan Construction Corporation) are the only cases in the country which are squarely in point and are not distinguishable from the undisputed facts of the case at bar.

The petitioner, Gahagan Construction Corporation, respectfully calls the attention of this Honorable Court to the fact that at the trial of this case in the District Court the trial judge ruled that Dredge No. 5 was engaged solely in procuring fill or dirt to add to the Airport (R. p. 180), and urges that in applying the doctrine of "local concern" only the dredging of the fill and the depositing of the same on the Airport, which was all part of one operation, may be considered.

The petitioner earnestly submits that never will any Court in the future be presented with a case which more clearly demands the application of the "local concern" doctrine than this one; that, if the operations of Dredge No. 5 are ruled to be without the scope and protection of that doctrine, it is impossible to conceive of a set of facts to which it could apply. (For arguments in support of this assertion see pages 17-20 of supporting brief, attached hereto.)

2. Need for clarification of law.

The law with respect to the applicability of the "local concern" doctrine already is in a confused state and to allow the decision of the Circuit Court of Appeals for the First Circuit in this case to stand will serve only to increase that uncertainty and confusion, and will create untold hardship on employees, employers and their insurers alike throughout the country.

Up to the date of the Circuit Court of Appeals' decision in this case, the "local concern" doctrine has consistently

been held to be applicable to dredges and other harbor craft engaged exclusively in filling in land (*Fuentes* v. *Gulf Coast Dredging Co.*, 54 F. (2d) 69 (1931); *J. C. Penney-Gwinn Corp.* v. *McArdle*, 27 F. (2d) 324), digging new navigable channels through land (*United Dredging Co.* v. *Landberg*, 18 F. (2d) 453 (1927)), and digging into the land side of a harbor to enlarge the capacity of a private dock. *Toland's Case*, 258 Mass. 470. It is extremely significant that not a single case has been produced by the respondent's counsel or in the opinions of the District Court and Circuit Court of Appeals in this case which directly or indirectly attacks the validity or the logic of those decisions as applied to the uncontroverted facts of this case. The petitioner after diligent search feels that there are none. If the decision in this case by the District Court and the Circuit Court of Appeals is allowed to stand, at least on this particular issue, the numerous Courts in the Circuits outside the First Circuit are left free to follow either the First or the Fifth Circuits with respect to any pertinent issues decided therein.

In the face of the situation as it now exists, the most competent counsel may be unable to predict which line of decisions will ultimately be followed or on which side of the line a particular employment will fall. Yet employees, employers and their insurers are asked to determine with certainty, before bringing their actions or before setting up a defense thereto, issues over which Courts regularly divide among themselves and within their own membership. As penalty for error the employee may suffer serious financial loss or find his claim barred by the statute of limitations in the proper forum while he was erroneously pursuing it elsewhere. The employer likewise may find that his insurance under State Compensation Acts or under the Federal Longshoremen's Act, to which he is compelled to subscribe and contribute, wholly fails

to protect him against the very liabilities for which that insurance was specifically planned. *Davis* v. *Department of Labor and Industries of the State of Washington*, 317 U.S. 249.

3. Decision contrary to intent of Congress.

The decision of the Circuit Court of Appeals for the First Circuit in this case is directly opposed to and in conflict with the expressed intent of the Longshoremen's & Harbor Workers' Compensation Act of the United States, 33 U.S.C. §§ 901 *et seq.*, and decisions of this Court pertaining to that Act. Also the refusal of the trial judge to consider or submit to the jury the question as to whether Armao was a "member of the crew" within the meaning of the exclusion clause of the Longshoremen's Act was a violation of a fundamental if not a constitutional right of the petitioner.

At the conclusion of the District Court judge's charge to the jury both plaintiff's counsel and defendant's counsel requested the trial judge to instruct the jury with respect to the meaning and effect of the words "member of the crew" in the exclusion clause of the Longshoremen's Act. The record, at pages 186 and 187, shows beyond a doubt that in this connection the District Court judge did not properly instruct himself or the jury as to the law applicable to the point sought to be raised by both counsel. When asked by plaintiff's counsel to say a word to the jury about the meaning of "member of the crew," the judge replied: "That language does not appear in the statute" (R. p. 186). The judge obviously referred to the Jones Act. When plaintiff's counsel in pressing his request explained that he referred to the exclusion clause of the Longshoremen's Act, the judge stated (R. p. 187): "I don't think I need to because you are referring to a statute which I have not commented on and I don't want

to go into it." Defendant's counsel duly saved the defendant's rights for the failure or refusal of the judge to properly instruct the jury with respect to the meaning, effect and applicability of the said exclusion clause. The defendant argued before the District Court judge and again before the Circuit Court of Appeals that as a matter of law the plaintiff Armao was not a "member of the crew," and cited various decisions of the Court in support of such contention (see brief appended for cases relied upon), but whether the question of the plaintiff's status as a "member of the crew" or as a "non-member of the crew" be one of fact or of law, the defendant had a fundamental if not a constitutional right to have that question determined specifically, since, under all the decisions of this Court rendered subsequently to the passage of the Longshoremen's Act, if Armao was not a "member of the crew," he cannot maintain an action under the Jones Act.

The Circuit Court of Appeals in holding that "Although perhaps it would have been preferable for the trial judge to use the term 'member of the crew' and then define it, there is no magic in that phrase that absolutely requires its use in a charge" and in further holding that "the jury in substance found that the plaintiff was a member of the crew, although it did not consider those exact words" (Opinion, R. p. 206), completely overlooked or ignored the intent and effect of the Longshoremen's Act and decisions of this Court, which have consistently held that "Congress intended to except from the benefits of the Longshoremen's Act only those persons ordinarily and generally considered as seafaring men, at least only those employed on board a vessel having a master and crew." *DeWald* v. *Baltimore & Ohio R. Co.*, 71 F. (2d) 810; cert. den. 293 U.S. 581, No. 207. The record is clear in this case that the issue whether Armao was a member of the

crew was never considered or submitted to the jury, but, on the contrary, the trial judge actually refused to submit that issue or comment upon any phase of the Longshoremen's Act. Your petitioner, therefore, was unlawfully deprived of its absolute right to invoke an Act of Congress which was by its very terms applicable in cases of this nature.

Assignment of Errors Intended to be Urged in the Event that a Writ of Certiorari Issues.

The petitioner submits that the Circuit Court of Appeals for the First Circuit erred in affirming the judgment of the District Court, in refusing to set aside the verdict of the jury and any judgment entered thereon, in refusing to enter a judgment for the defendant or in refusing to grant a new trial.

In the event that a writ of certiorari is granted in this case the petitioner intends to rely upon the following issues of law and arguments amply supported by authorities as grounds for reversal of the judgment of the District Court and affirmation thereof by the Circuit Court of Appeals:

I. The remedy afforded to the plaintiff under the Workmen's Compensation Act of the Commonwealth of Massachusetts is exclusive of all other remedies. Therefore the plaintiff's cause does not fall within the jurisdiction conferred upon this Court to hear cases of an admiralty nature, whether on the admiralty or on the law side of the docket.

II. If the Circuit Court of Appeals should rule that the State Compensation Act is not applicable to the cause now under consideration, resort to the Longshoremen's & Harbor Workers' Compensation Act of the United States, 33

U.S.C. §§ 901 *et seq.*, is mandatory as between the plaintiff employee and the defendant employer.

III. Even if the Circuit Court of Appeals should rule that neither the State Compensation Act nor the Longshoremen's & Harbor Workers' Compensation Act applies to the case at bar, nevertheless the plaintiff cannot recover in this civil action.

IV. The District Court erred in denying the defendant's motions for a directed verdict.

V. The District Court erred in denying or refusing to allow the defendant's requests for rulings 1 to 13, inclusive, which were duly filed at the conclusion of the evidence in the District Court.

VI. The District Court erred in refusing or failing to charge or instruct the jury in accordance with the defendant's requests for rulings and instructions.

VII. The District Court erred in refusing or failing to charge the jury upon request of counsel for the defendant that, in order to recover under the Jones Act, the plaintiff Armao must have sustained his burden of proving not only that he was a seaman within the meaning of the Jones Act but that he was also a "member of the crew" within the meaning of the exclusion clause of the Longshoremen's & Harbor Workers' Compensation Act of the United States.

VIII. The District Court erred in charging the jury as to the test to be applied to this case as set forth in the record at pages 178 and 180.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the First Circuit commanding that Court to certify and send to this Court a full and complete transcript of the court record and all proceedings of said Circuit Court of Appeals in the case numbered

and entitled on the docket of that Court, "No. 4280, *Gahagan Construction Corporation, Defendant, Appellant,* v. *Philip Armao, Plaintiff, Appellee,*" to the end that the said case may be reviewed and determined by this Court, and that your petitioner may have such other and further relief in the premises as to this Court may seem just and proper.

GAHAGAN CONSTRUCTION CORPORATION,
By PAUL R. FREDERICK,
Counsel for Petitioner.

BADGER, PRATT, DOYLE & BADGER,
CHARLES C. PETERSEN,
Of Counsel.

I hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay and that in my opinion the case is a proper one for the issuance of a writ of certiorari.

PAUL R. FREDERICK,
Counsel for Petitioner.

Dated March 12, 1948.

Supreme Court of the United States.

OCTOBER TERM, 1947.

GAHAGAN CONSTRUCTION CORPORATION,
Petitioner,
v.
PHILIP ARMAO,
Respondent.

BRIEF FOR THE PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Memorandum and Opinion Below.

The memorandum of the District Court appears in the record at pages 18 to 23. The opinion of the Circuit Court of Appeals appears in the record at pages 199 to 208. Neither the memorandum nor the opinion has yet been printed in any official report.

Jurisdiction.

The respondent Armao was injured while he was employed on the petitioner's dredge which was engaged exclusively and solely in filling in land. For a substantial period following the receipt of his injuries Armao was paid compensation by the petitioner's insurer under the terms and provisions of the Massachusetts Workmen's

Compensation Act (G.L. (Ter. Ed.) c. 152). Almost a year from the date of the injury this action at law under the Jones Act was instituted on the theory that Armao was a "seaman" and a "member of the crew." The petitioner denied his status as such and contended among other things that the accident was not within the maritime jurisdiction of the United States; that Armao's sole remedy, if any, was under the State Workmen's Compensation Act or under the Longshoremen's & Harbor Workers' Act of the United States (33 U.S.C. §§ 901 *et seq.*). Two of the most important issues raised in these proceedings are whether the "local concern" doctrine is applicable to this case so as to render the State Compensation Act the exclusive remedy, and whether the refusal or neglect of the District Court judge to consider or submit to the jury the question as to the applicability or effect of the exclusion clause of the Longshoremen's & Harbor Workers' Act of the United States was a violation of the petitioner's fundamental if not constitutional right.

Statement of the Case.

A statement of the case is set forth in the petition at pages 1-7.

Specification of Errors.

See Assignment of Errors in the petition at pages 12-13.

Summary of Argument.

1. There is conflict between the decisions of the Circuit Courts of Appeals with respect to application of the "local concern" doctrine.

2. The law needs clarification, and to allow the decision in this case to stand will create widespread hardship.

3. The decision in this case is contrary to the intent of Congress and in violation of the rights of the petitioner.

Argument.

1. THERE IS CONFLICT BETWEEN THE DECISIONS OF THE CIRCUIT COURTS OF APPEALS WITH RESPECT TO APPLICATION OF THE "LOCAL CONCERN" DOCTRINE.

The decision of the Circuit Court of Appeals for the First Circuit is directly opposed to and in conflict with decisions of this Court and of the Circuit Court of Appeals for the Fifth Circuit in ruling that, if the respondent was a seaman injured on navigable waters, there is no place for the application of the doctrine of "local concern."

At the outset it must be remembered that in this case the dredge in question (Dredge No. 5) was engaged solely and exclusively in procuring fill or dirt to add to the Airport, that the District Court judge so ruled (R. p. 180) and that this entire case was tried and argued and the jury charged upon the uncontroverted fact that the dredging of the fill or dirt and the depositing of the same on the Airport was all part of one operation.

Since the exact nature of the operations of Dredge No. 5 is not in dispute and in view of the trial judge's express ruling that it was "engaged solely in procuring fill or dirt to add to the airport" (R. p. 180), it would seem that no extended argument is necessary to convince this Court that decisions involving dredges or other craft engaged in improving navigable waters or in like maritime operations are not pertinent or applicable to this case.

It is respectfully submitted that this civil action should and must be governed by the principles laid down in the

cases of *Fuentes* v. *Gulf Coast Dredging Co.*, 54 F. (2d) 69; *J. C. Penney-Gwinn Corp.* v. *McArdle*, 27 F. (2d) 324, and by the supporting dicta in *Melanson* v. *Bay State Dredging & Contracting Co.*, 62 F. Supp. 482.

The Fuentes case is not merely a "close" or "parallel" case but is squarely in point and indistinguishable from the case at bar. Like the instant one, the Fuentes case was an action at law brought under the Jones Act to recover for personal injuries sustained by an employee on a dredge. The Court said at page 70: "The dredge on which the appellant was working at the time of his injury was in Galveston Bay close up to Virginia Point in shallow water, not more than two or three feet deep pumping silt and sand from the bottom through a pipe line for the purpose of filling in and raising the elevation of . . . land on Virginia Point. It had not been able to float to its position near the land but had cut its own channel . . . The dredging operations were not being conducted in the aid of commerce or navigation, but the deepening of the water was merely incidental to the improvements that were being made on land. . . . In this case it is agreed that the employer is a subscriber to the Workmen's Compensation Law of Texas and that the employee was bound by its provisions if they are applicable. . . . We are of opinion that notwithstanding the Merchant Marine Act the District Court was without jurisdiction to entertain the action and that the remedy afforded to the appellant under the Workmen's Compensation Law of Texas is exclusive of all other remedies. If it be conceded that the waters of Galveston Bay, where the accident occurred are navigable and that in the absence of a state compensation law the Admiralty Court would have had jurisdiction, yet the maritime law is not so exclusive as to prevent recovery under state compensation acts in all cases of accident on navigable waters; but where the matter is of mere local

concern and the regulation of the relation of employer and employee works no prejudice to the general maritime law the state may prescribe an exclusive remedy. [Cases cited.] Upon the authority of the just cited decisions of the Supreme Court the judgment is reversed and the cause remanded to the District Court with directions to dismiss appellant's action for want of jurisdiction but without prejudice to pursue any remedy he may have under the Workmen's Compensation Law of Texas."

The McArdle case involved dredges engaged in filling in land in order to bring it to the required grade, and the Court held at page 325: "There is no doubt that a dredge engaged in navigation or in doing work for the purpose of improving a channel, or that will be in aid of navigation in certain circumstances is subject to admiralty jurisdiction, but a distinction is made where a vessel or other floating structure is not so engaged. . . . Of course the dredging deepened the water where the material was removed; but that was merely incidental to the work being done. The dredges were not engaged in either commerce or navigation. The purpose of employing them was to make improvements on land, not for the purpose of aiding maritime commerce, but to fill up land in order to bring it to the required grade."

Judge Healey of the United States District Court for the District of Massachusetts, in distinguishing the facts of the case before him, *Melanson* v. *Bay State Dredging & Contracting Co.*, 62 F. Supp. 482, from those in the Fuentes and McArdle cases, said at page 485: "In the Fuentes and McArdle cases supra the dredges involved were being used for the purpose of filling in land which activity of course is of purely local concern. [Cases cited.]."

In *United Dredging Co.* v. *Lindberg*, 18 F. (2d) 453, the right of recovery was upheld under the Workmen's Com-

pensation Law of Louisiana. The dredge in that case was engaged in cutting a navigable channel or canal across land. Notwithstanding the fact that there was deep water around the dredge and the channel being dug was intended to be navigated when finished, the Court held that the matter was of "mere local concern" and that the Workmen's Compensation Act governed to the exclusion of the Merchant Marine Act. The Court specifically held that the District Court was without jurisdiction to entertain the action under the Jones Act. See also *Toland's Case*, 258 Mass. 470, which is directly in point.

In the light of the foregoing decisions, which, in so far as your petitioner can determine, have never been overruled or repudiated until the Circuit Court of Appeals for the First Circuit in this case refused to follow them, it is manifest that the decision of the Circuit Court of Appeals in this case is directly opposed to and in conflict with the just cited cases of the Fifth Circuit.

Your petitioner earnestly urges that none of the cases cited in the District Court's memorandum (R. pp. 20-21) or in the opinion of the Circuit Court of Appeals (Opinion, R. pp. 201-203, incl.) in opposition to the petitioner's contention involved the filling in of land by dredging operations, and that they therefore have no application to the uncontroverted facts in this civil action.

It is respectfully submitted that never will any Court in the future be presented with a case which more clearly demands the application of the "local concern" doctrine than this one; that this case does not represent one of those "twilight zone" or marginal cases so often referred to as such (*Davis* v. *Department of Labor and Industries of State of Washington*, 317 U.S. 249, 255-260), but involves essentially a "land operation" having no direct relation to navigation or interstate and foreign commerce.

2. THE LAW NEEDS CLARIFICATION, AND TO ALLOW THE DECISION IN THIS CASE TO STAND WILL CREATE WIDESPREAD HARDSHIP.

The law with respect to the applicability of the "local concern" doctrine already is in a confused state. To allow the decision of Circuit Court of Appeals in this case to stand will only increase that uncertainty and confusion and will create untold hardship on employers, employees and their insurers throughout the country.

In order to avoid repetition, your petitioner incorporates by reference herein its reasoning set forth in the second part of its petition and respectfully calls to the attention of this Honorable Court the decision in *Davis* v. *Department of Labor,* which contains an excellent discussion of the hardships which are continually injuring employees and employers alike because of confusion and uncertainty with respect to the applicability of the "local concern" doctrine.

It is respectfully submitted that the Court now has the opportunity and indeed the duty to dispel any future uncertainty with respect to the applicability of the "local concern" doctrine to dredges or other craft which are solely and exclusively engaged in filling in land. In many cases involving "twilight zone" or marginal cases it often is inexpedient or impossible to lay down any hard and fast rule concerning that doctrine, but there are no such complications here. It has been ruled in this case that Dredge No. 5 was engaged exclusively and solely in filling in land. The only cases in the country (except the present decision now under consideration) involving dredges or other craft exclusively so engaged have held such operations to be "of purely local concern." Manifestly those decisions cited by the petitioner in its behalf are predicated upon the logical conclusion that operations by dredges or other craft which are to all practical purposes essentially "land

operations'' are not subject to admiralty jurisdiction. Overruling those decisions would serve no useful purpose and would, it is urged, merely increase the difficulties of the Courts and all parties concerned.

The judgment and decision of the Circuit Court of Appeals for the First Circuit should be reversed.

3. THE DECISION IN THIS CASE IS CONTRARY TO THE INTENT OF CONGRESS AND IN VIOLATION OF THE RIGHTS OF THE PETITIONER.

The decision of the Circuit Court of Appeals for the First Circuit in this case is directly opposed to and in conflict with the expressed intent of the Longshoremen's & Harbor Workers' Compensation Act of the United States, 33 U.S.C. §§ 901 *et seq.*, and decisions of this Court pertaining to that Act. Also the refusal of the trial judge to consider or submit to the jury the question as to whether Armao was a ''member of the crew'' within the meaning of the exclusion clause of the Longshoremen's Act was a violation of a fundamental if not a constitutional right of the petitioner.

One of the principal defenses to this action which was relied upon by the petitioner at the time of trial and which will be argued before this Court if certiorari is granted is that, if it is decided that the work in which Armao was engaged when he sustained his injuries was maritime and that his injuries occurred under circumstances which preclude the State Compensation Act from providing recovery, resort to the Longshoremen's Act is mandatory unless Armao is found to be a ''member of the crew'' within the meaning of the exclusion clause of that Act.

Your petitioner has also contended from the outset of this case that, in order to establish any right whatever under the ''Jones Act,'' Armao must specifically prove not

only that he was a "seaman" under the "Jones Act" but that he also was a "member of the crew" within the meaning of the exclusion clause of the Longshoremen's Act.

The Longshoremen's Act expressly provides that liability thereunder "shall be exclusive and in place of all other liability of such employer to the employee, his legal representative . . . at law or in admiralty," and that recovery may not be had thereunder unless the injuries occurred under circumstances which "preclude the State Compensation laws from providing recovery." The Longshoremen's Act by its terms excludes from its coverage "A master or member of a crew of any vessel" (33 U.S.C. §§ 903, 905).

It therefore is manifest that, by virtue of the Act itself, your petitioner has the absolute right to have specifically determined the issue whether Armao was a "member of the crew" within the meaning of the exclusion clause of the Longshoremen's Act.

The District Court judge not only refused to charge or instruct the jury in this regard but stated to counsel (R. p. 187) ". . . you are referring to a statute which I have not commented on and don't want to go into it."

The petitioner respectfully submits that the refusal of the trial judge to consider or at least submit that issue to the jury constituted a violation of its fundamental if not constitutional right.

The following cases are cited in support of its statements in the foregoing paragraphs and in part 3 of its petition (*supra*, pp. 10-12).

The case of *International Stevedoring Co.* v. *Haverty*, 272 U.S. 50, and many other cases decided before the passage of the Longshoremen's & Harbor Workers' Compensation Act have held that one employed as a stevedore or harbor worker was so far a "seaman" that, if he was injured on board a ship on navigable waters, he could sue his

employer in reliance upon the Jones Act. Congress, however, has, since those decisions, and in the light of them, varied the protection of maritime workers according to nature and circumstances of their employment. No inference that Congress seeks to protect stevedores and harbor workers by the Jones Act can be drawn, because since 1927 Congress has expressly indicated the protection it intends for "longshoremen and harbor workers" as distinguished from "seamen" *who are also "members of the crew."*

In *Obrecht-Lynch Corporation* v. *Clark,* 30 F. (2d) 144, at 146, the Court said in substance that, although the Supreme Court in the Haverty case held longshoremen to be "seamen" under the Jones Act, under the Longshoremen's Act Congress has apparently expressed an intention to remove such persons from the operation of the earlier Act as thus construed and to place them under the later Act.

In *Kibadeaux* v. *Standard Dredging Co.,* 81 F. (2d) 670, it was stated at page 672 that "the Longshoremen's Act . . . of course modifies further the general admiralty law of the United States in so far as it concerns persons who, like longshoremen were seamen under the former law, but are put under the latter by its terms."

The presumption is that in the absence of substantial evidence to the contrary the claim comes within the provisions of the Longshoremen's and Harbor Workers' Act.

Taylor v. *McManigal, Deputy Comm.,* 89 F. (2d) 583.

DeWald's case (*DeWald* v. *Baltimore & Ohio R. Co.,* 71 F. (2d) 810; cert. den. 293 U.S. 581, No. 207) on its facts is very similar to the case at bar and the sole point involved was whether DeWald was a "member of the crew" at the time he met his death by drowning. The judge below found DeWald to be a "member of the crew," but the Circuit Court of Appeals reversed the decree entered below

and ruled that DeWald was not a "member of the crew." The Court said: ". . . While Congress has not in the Act [Longshoremen's & Harbor Workers' Act] definitely classified those persons who are entitled to receive benefits under it . . . it is to us reasonably clear that Congress intended to except from the benefits of the Longshoremen's Act only those persons ordinarily and generally considered seafaring men, at least only those employed on board a vessel having a master and a crew. It is significant that Congress did not use the term 'seamen' in section 903 of the Act. It would undoubtedly have used that term had it intended to exclude from the benefits of the Act all those who have been held by the Courts to be seamen in the more liberal interpretation of the term."

The case of *South Chicago Coal & Dock Co.* v. *Bassett*, 104 F. (2d) 522, reviewed and affirmed by this Honorable Court, decided that, where a deceased workman employed on a vessel used solely for fueling other vessels had no duties pertaining to the navigation of the vessel except the incidental task of throwing a ship's line and his primary duty was to free coal if it stuck in the hopper while being discharged into the fueled vessel, and he had no "articles," such a workman was not a "member of the crew" but was a longshoreman under the exclusive protection of the Longshoremen's Act. The Court said: ". . . While we have given some weight to the fact that the certificate of inspection required the craft to have a crew of five . . . and that . . . five would be present only if the [deceased] were included, we are convinced that the word 'crew' as used in the certificate has a different significance and connotation than the word 'crew' as used in the statutory exception. The Longshoremen's Act contemplated the exclusion of that body of men who in the common parlance make up the ship's complement, those who regularly or ordinarily are engaged in seafaring and navigation, not those whose tasks are of such a nature that they are independent of

navigation in their scope, such tasks which might as well have their background on shore or at the dock . . . It was an ordinary laborer's job, and it was mere happenstance that the location of his position was on shipboard."

Taking into consideration the cases cited in this brief and petition, and the history and intent of Congress in passing the Longshoremen's & Harbor Workers' Act, there can be no doubt that in order to recover under the Jones Act the plaintiff must sustain the burden of proving not only that he was a "seaman" within the meaning of the Jones Act but that he was also a "member of the crew" within the meaning of the exclusion clause of the Longshoremen's Act. It follows, therefore, that *both* Acts must be considered, specifically interpreted and applied.

In this case the District Court judge refused to consider or comment upon the Longshoremen's Act or any phase thereof (R. pp. 186, 187).

Surely a writ of certiorari should be granted in this case to enable this Court to review and correct the manifest error of the District Court and the Circuit Court of Appeals in refusing to consider or apply a pertinent Act of Congress.

Conclusion.

In conclusion, it is urged that this petition and brief, verified by the record on file, discloses a serious conflict between Circuit Courts of Appeals upon issues which not only affect the immediate parties to this civil action but gravely concern employees, employers and their respective insurers throughout the country.

Wherefore your petitioner prays that a writ of certiorari issue as prayed for.

Respectfully submitted,

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BADGER, PRATT, DOYLE & BADGER,
CHARLES C. PETERSEN,
Of Counsel.

FILE COPY

Supreme Court of the United States

October Term, 1947.

No. 673.

GAHAGAN CONSTRUCTION CORPORATION,
Petitioner,

vs.

PHILIP ARMAO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

SAMUEL B. HOROVITZ,
Attorney for Respondent.

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STANLEY H. RUDMAN,
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LAWYERS BRIEF & PUBLISHING CO.
BOSTON, MASS.

SUBJECT INDEX.

Cases Cited.

STATUTES CITED.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of Facts.

This is an action at law under the Jones Act, 41 Stat. 1007, 46 USC § 688. The contention of the plaintiff, the respondent in this petition, is that on November 11, 1945, while he was employed by the defendant, the petitioner herein, as a deckhand and member of the crew of a dredge operated by the defendant on navigable waters of the United States in Boston Harbor, he sustained severe injuries because of the defendant's negligence.

At the time of the accident, the defendant was engaged in a dredging operation for the Commonwealth of Massa-

chusetts, the purpose of which operation was two-fold: first, material was being dredged from specified areas by the hydraulic method to be used as fill on embankments at Logan Airport in East Boston, thereby increasing the area and operations of the airport and, as a necessary appurtenance to that purpose, filling in a channel which ran in the vicinity; second, a new channel was dug much longer, wider and deeper in character than the old channel, the fill from which was being used to increase the size of the airport embankments (R. p. 85).

Dredge No. 5 on which the plaintiff was employed was one of the dredges used in this work. It pumped silt and sand from the bottom of the harbor and by means of a pipe extending from the dredge to the shore deposited them on the airport. There is no contention that the dredge had any more than limited motive power of its own.

Aside from any question of negligence, concerning which no question has been raised on appeal, the jury could have believed the following evidence:

Dredge No. 5 in November of 1945 was working in Boston Harbor in the area bounded by Logan Airport, East Boston and Winthrop (see Ex. 6); that in this area the average mean high water elevation was 9½ to 11 feet (R. pp. 80, 105), and that boats could and did operate in the area (R. pp. 77, 108-111). The plaintiff testified (R. p. 34) that he was hired to "do a seaman's work", that he was to be paid ninety cents an hour, and that his work consisted of picking up the lines, filing the anchors, setting up navigation lights, going out in a rowboat to fix the lights, repairing lines, going on a tugboat to throw out lines, and checking the running and navigation lights (R. p. 35). Exhibit 5, which is a copy of the contract between the defendant and the Commonwealth of Massachusetts, has contained within it a wage

schedule showing that the plaintiff drawing ninety cents an hour was classified as a "deckhand" rather than as a laborer. That an actual channel was dug is undisputed (R. p. 72) and that this channel replaced an old one.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by an Act of February 13, 1925, C. 229, 28 USC Sec. 347 (a).

Argument.

1. THE DECISION OF THE CIRCUIT COURT IS A MERE RESTATEMENT OF EXISTING LAW.

It is respectfully submitted that upon the above stated evidence it is clear that the plaintiff was employed on a vessel plying in navigable waters.

The argument of the defense is first based upon the assumption that either the Federal or the State compensation act applies.

The applicability of the State act is based upon the assumption that the matter is of local concern and not within the exclusive admiralty jurisdiction of Congress and the Federal Courts. It is an argument based upon such cases as *Grant Smith-Porter Ship Company v. Rohde*, 257 US 469 (1922) and its escape from *Southern Pacific Co. v. Jensen*, 244 US 205 (1917). A comparison of *Davis v. Department of Labor*, 317 US 249 (1942) and *Parker v. Motor Boat Sales*, 314 US 244 (1941) seems to indicate that there is a shadowy area in which compensation acts may overlap, but there is no indication in those cases that the Jones Act and compensation acts conflict (see Opinion, R. p. 199, 202-203).

Properly then, the question to be determined is whether the plaintiff is a member of the crew so as to exclude himself from the operation of the Longshoremen's and Harbor Workers' Act. This question must be construed in the light of the above stated evidence.

The word "crew" does not have an unvarying meaning or legal significance. Different conclusions may be drawn from the same facts. *South Chicago v. Bassett,* 309 US 251 (1940). In *Norton v. Warner,* 321 US 565 (1944), this Court defined "crew" as those naturally and primarily on board to aid in navigation, but navigation embraced duties other than "putting over the helm". The Court's definition included all those who contribute to the labors about the operation of the vessel. It is respectfully submitted that the plaintiff performed tasks within this definition and that the jury had sufficient evidence upon which to make its finding. See, also, *Schantz v. American Dredging Co.,* 138 F. (2d) 534 (C. C. A. 3rd, 1943); *Maryland Casualty Company v. Lawson,* 94 F. (2d) 190 (C. C. A. 5th, 1938); *Pariser v. City of New York,* 146 F. (2d) 431 (C. C. A. 2nd, 1945).

From the above decisions it also seems clear that "when a dredge is in navigable waters digging for land, the dredge is as much within admiralty jurisdiction as if it were a fishing boat in which the crew were seeking to get fish out of the water, or a rowboat in which the oarsmen were seeking to get sponges or clams. I cannot see any rational basis for saying that a dredge is not within admiralty jurisdiction merely because the dirt and fill which it picks up is to be put upon land. The fish which the crew of a fishing vessel takes out of the waters is ultimately in most cases destined to go into stomachs of men on land" (R. p. 21).

Your plaintiff therefore respectfully submits that by its decision the Circuit Court has reiterated to a large extent

the area of operation of the various Federal and State acts. The decision has clearly and for all times provided a simple statement concerning the separation of Jones Act cases from compensation cases, and has properly applied the doctrine of local concern to those persons who are not members of a crew contributing about the operation and welfare of the vessel. To the practicing attorney it represents a simple rule to follow in the prosecution and defense of these actions and in the economic advisement of his client as to his insurable risks.

2. THERE IS NO CONFLICT BETWEEN CIRCUITS.

The defendant has rested its argument that there is a conflict between circuits upon a line of decisions in the Fifth Circuit which state that dredges engaged in digging new channels or improving the shore are not within maritime jurisdiction. See *Fuentes v. Gulf Coast Dredging Co.*, 54 F. (2d) 69 (1931); *United Dredging Co. v. Lindberg*, 18 F. (2d) 453 (1927), cert. denied, 274 US 759 (1927); *Kibadeaux v. Standard Dredging Co.*, 81 F. (2d) 670, 672 (1936), cert. denied, 299 US 549 (1936). The first two of the above cited cases indicate that the particular dredges involved were not in navigable waters at the time the operations began, but were engaged in making waters which might eventually be used for purposes of navigation. The *Kibadeaux* case, *supra*, written by the same Circuit appears to make that distinction. In *Radcliff Gravel Co. v. Henderson*, 138 F. (2d) 549 (1943), the same Court had before it a question as to which compensation act should apply, State or Federal, where the employer was engaged in dredging gravel and sand from the bed of navigable waters. Two employees who were killed in the operation were engaged in trimming the sand and gravel as it was loaded onto barges, but apparently that operation consisted of not much more than

using rakes to keep the sand and gravel level in preference to allowing it to form a pyramid. They were furnished transportation to and from the shore by boat. With these facts before it, the Court held that the State compensation act did not apply and it cited, among other cases, *Parker v. Motor Boat Sales, Inc.*, 314 US 244. In *Standard Dredging Corp. v. Henderson*, 150 F. (2d) 78 (1945), the Supreme Court had before it a situation in which a company was using a dredge to enlarge and deepen a navigable channel. The dredged material was carried to the shore through a pipe and there it was distributed to make a fill later used by the county for approaches to a bridge for crossing the canal. The entire operation was done under a single contract which obviously had two purposes. The particular plaintiff worked mostly on shore managing the shore pipes which connected with the pipes from the dredge, and his only connection directly with water was that he was transported by boat to the dredge from where he walked across a series of pontoons to his employment on the shore. While walking on those pontoons, he slipped and was drowned. Said the Court, at page 80: "His work, though mostly on land, was in direct connection with and assistance of the dredge which was engaged in improving a navigable waterway. The placing of the dirt on shore was only incidental to the main enterprise, which was maritime". And again the Court rested on the *Parker* case, *supra*.

It may be said that the Fifth Circuit Court began a departure from its earlier cases in the *Kibadeaux* case, *supra*, for that case holds clearly that a seaman working upon a dredge which was engaged in clearing out navigable channels is entitled to admiralty remedies and is not bound by compensation acts, and in so doing, at page 672, the Court made the previously mentioned distinction between this case

and its earlier decisions. It is, therefore, respectfully submitted, in view of the decisions of this Court and of the Fifth Circuit, there is no longer any conflict in the matter but that it is now clear from the previous decisions and the decision in *Norton v. Warner Co.*, 321 US 565 (1944) and *Pariser v. City of New York*, 146 F. (2d) 43 (1945), the doctrine of local concern is no longer applied by any Court to a true seaman; that the doctrine was in the original instance not intended to be so applied; and that the First Circuit in holding that this case did not fall within that doctrine acted properly and in accordance with accepted and intended law; that to hold that a seaman and a member of the crew was subject to the doctrine of local concern would give to that person who has greater rights and interest in the remedies provided by the Admiralty Court a lesser right than a longshoreman, who, while also a seaman, being covered by the Longshoremen's Act, is never subjected to the doctrine of local concern. It would be an anomalous position if the longshoreman, whose right to an admiralty remedy derives from his performance of the historical seaman's duties, should find himself with greater access to the admiralty court, not subject to the doctrine of local concern, in preference to the modern seaman whose activities are more directly related to his historical antecedent and is more logically accessible to the rights of his predecessors. It is submitted that a development of the doctrine of local concern was never so intended and that so to apply it now would be in contravention to the *Jensen* rule, and those cases which attempted to avoid the *Jensen* rule, and contrary to the intention of Congress in its passage of the Longshoremen's Act.

3. THE CHARGE OF THE DISTRICT COURT AS GIVEN TO THE JURY WAS CORRECT AND DID NOT VIOLATE THE DEFENDANT'S RIGHTS.

The District Court judge in his charge (R. p. 177 *et seq.)* did not use the term "member of the crew". And in response to a request to instruct as to the meaning of the words "member of the crew under the Jones Act" (R. p. 186), the Court refused (R. p. 187).

It is true, as the Court said, that there is no such phrase in that Act. And the Court refused to comment on the Longshoremen's Act.

But the Court did give to the jury an instruction in accordance with the definition given in *Norton v. Warner Co.*, 321 US 565, at 572, namely "every one . . . who . . . contributes to the labors about the operation and welfare of the ship when she is upon a voyage" (R. pp. 180, 181).

It is respectfully suggested that the use of the specific term would add nothing which would be of help to the jury and that mention of the Longshoremen's Act would only create confusion. There is no magic phrase needed so long as the jury must of necessity from the charge find the same facts upon which to award the plaintiff damages. This, the plaintiff submits, was the necessary result of a perfectly proper, clear, well-defined charge as given by the District Court judge.

Conclusion.

It is respectfully submitted that it has been the policy of this Court "to abstain from taking a case even though it thought it erroneously decided below, whether on an issue of law or fact, if the decision did not involve an important

question of law, did not create a diversity of decision in lower courts, or would not seriously affect the administration of law in other cases. And this has been especially so where a decision below recognized the controlling legal principles but was claimed to have applied them improperly to the specific facts disclosed." *Bailey v. Central Vermont Railway,* 319 US 350, at 357.

It is clear from his Memorandum (R. p. 18) that the judge of the District Court knew the correct principles. It is suggested that he so applied them. The Circuit Court also states and applies the principles properly. The decision is a mere compilation of previous decisions reduced to their essence and stated succinctly. It is submitted further that any possible conflict between Circuit Courts could only transpire between the First and Fifth Circuits, but that this conflict does not exist by reason of the intention of the Fifth Circuit, as evidenced in its opinions, that its earlier conflicting decisions are no longer controlling on a similar statement of facts.

It is respectfully suggested that the decision of the lower courts ought not to be here reviewed; that nothing is to be gained by such a review, and the decision as it stands is a proper one.

Wherefore your respondent prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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